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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

FRANK A. MARULLO, JR., ET AL.
PETITIONERS

VERSUS

NOEL PATRICK CASSANOVA, ET AL.
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

RICHARD P. IEYOUB
ATTORNEY GENERAL

BRUCE A. CRANNER
COUNSEL OF RECORD
C.T. WILLIAMS, JR.
J. ELLIOTT BAKER
Special Assistant Attorneys General
BLUE WILLIAMS, L.L.P.
3421 N. Causeway Blvd., 9th Fl.
Metairie, LA 70002
Telephone: (504) 831-4091
Counsel for the Petitioners

39pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether the petitioners are entitled to qualified immunity to a lawsuit brought by a fired at-will government employee who engaged in activity beyond the scope of his duties, activity directly at odds with his supervisor's wishes, and activity which under existing law constitutes lawful grounds for termination, and who then pleads these facts in his Complaint so that the objective reasonableness of his discharge is established on the face of the Complaint, even though the Complaint also contains allegations of retaliatory intent.

II. Whether specific allegations that (1) state judges "acted under the color of state law", (2) in an official "administrative" capacity when they, (3) infringed upon a constitutional right held by a state employee through wrongful termination is sufficient to give rise to a consideration of qualified immunity such that the affirmative defense thereof could be said to appear on the face of the Complaint for purposes of a pre-answer Rule 12(b)(6) motion.

LIST OF PARTIES

Defendants–Petitioners

The Honorable Frank A. Marullo, Jr.
The Honorable James F. McKay, III
The Honorable Dennis J. Waldron
The Honorable Morris Reed
The Honorable Gerard J. Hansen
The Honorable Patrick Quinlan
The Honorable Calvin Johnson
The Honorable Frank Shea

Plaintiffs–Respondents

Noel Patrick Cassanova
Karen Sullivan Cassanova

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit affirming the District Court's denial of the petitioners' Motion To Dismiss on grounds of qualified immunity, dated February 9, 1995, of which the review of this Honorable Court is now sought is contained in the Appendix as Document 1. It is unreported.

The Order and Reasons of the United States District Court for the Eastern District of Louisiana, dated June 2, 1994, denying the petitioners' Motion To Dismiss on grounds of qualified immunity is contained in the Appendix as Document 2. It is unreported.

The Complaint, as amended, is contained in the Appendix as Document 3.

JURISDICTION AND THE REASONS FOR THE EXERCISE THEREOF

The Per Curiam Opinion of the United States Court of Appeals for the Fifth Circuit was entered on February 9, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

This Petition For Writ Of Certiorari presents the question of whether the petitioners, eight judges of the Criminal District Court for the Parish of Orleans, State of Louisiana, are entitled to qualified immunity in this lawsuit to the 42 U.S.C. §1983 claims, which are based primarily on the plaintiffs'/respondents' allegation that by terminating the respondent's employment, the judges/defendants/petitioners violated the respondent's constitutional right to free speech.

Petitioners respectfully submit that, given the facts of this case as pleaded in the Complaint, they are entitled to

qualified immunity as a matter of law, because they could have reasonably believed that their termination of the respondent was lawful. The ruling of the Court of Appeal has in effect reinstated subjective state of mind as a factor relevant to the consideration of qualified immunity. This Court specifically eliminated subjective state of mind as a factor relevant to the consideration of qualified immunity in Harlow v. Fitzgerald, 457 U.S. 800, 817–818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982).

Petitioners respectfully submit that in ruling that the petitioners were not entitled to the defense of qualified immunity given the facts of this case as pleaded in the Complaint, the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court. Hence, petitioners respectfully request that this Honorable Court exercise its discretion and take up the issue of whether the subjective state of mind of a governmental employer in discharging an employee is to be considered in determining whether that governmental employer is entitled to qualified immunity.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition involves the entitlement of the petitioners to qualified immunity from a lawsuit arising from their termination of a governmental employee. The defense of qualified immunity is jurisprudential. Hence, there is no constitutional or statutory provision which specifically sets out this defense.

Other constitutional and statutory provisions relevant to the issue raised by this Petition are as follows:

U.S. Const. amend. I

U.S. Const. amend. XIV
42 U.S.C. §1983
La. C.C. art. 2747
La. C.Cr.Proc. art. 404.1
La. C.Cr.Proc. art. 404.
La. R.S. 15:111

The text of these provisions, or relevant portions of the text, is contained in the Appendix as Document 4.

STATEMENT OF THE CASE

Facts

(1) Introduction and Nature of the Case

For the purpose of this Petition for Writ of Certiorari, this is a Section 1983 case involving alleged deprivation of constitutional rights as a result of what the plaintiff/respondent asserts to be retaliatory termination of his employment with the Board of Jury Commissioners of Orleans Parish. The defendants/petitioners are all judges of the Criminal District Court for the Parish of Orleans.

The position held by the plaintiff/respondent, Mr. Cassanova, prior to his termination was that of Secretary of the Board of Jury Commissioners for the Parish of Orleans. (Complaint, Appendix document 3 ¶4.)[1] The position is provided by statute, La. R.S. 15:111, and Mr. Cassanova was

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[1]Since the facts of this case for purposes of this Petition for Writ of Certiorari are established solely by the Cassanova's Complaint. The Complaint, as amended, has been attached hereto as Appendix Document 3.

employed by the Board upon recommendation from Governor Edwin W. Edwards. (Complaint, Appendix Document 3, ¶¶ 6–7.) Mr. Cassanova held this position until he was removed by the Judges after a majority vote in an en banc session. The named defendants herein are the same Judges who voted in favor of Mr. Cassanova's termination. (Complaint, Appendix Document 3, ¶ 27.)

(2) The Board of Jury Commissioners and the Nature of Mr. Cassanova's Employment

The Board of Jury Commissioners is a statutorily created body consisting of five members (commissioners) whose duties are, in essence, to insure the effective operation of jury selection and maintenance of the general venire. In Orleans Parish, the commissioners themselves are "appointed by the Governor, subject to confirmation of the Senate, to serve at his [the Governor's] pleasure." La.C.Cr.P. 404.1(A). The requirements for qualification to serve as a jury commissioner are set forth in Article 401 of the Code of Criminal Procedure and, although Mr. Cassanova as Secretary of the Board is required to possess these qualifications, he is not appointed as a commissioner. Mr. Cassanova is an employee of the Board elected by the commissioners to aid in the operation of the commission. The position of "Secretary" is a salaried position, La. R.S. 15:111, which is for no fixed term.

(3) The Activities of Mr. Cassanova while Employed by the Board

Although La.C.Cr.Proc. art. 404.1 specifically transfers the accounting function of the Board to the Judicial Administrator for the Criminal District Court, Mr. Cassanova's first action was to demand from the Judicial

Administrator all of the accounting documents. (Complaint, Appendix Document 3, ¶ 8.) Although Mr. Cassanova, as Secretary, is hired by the Board subject to supervision of the Court, and the Governor's office has no statutory control or direction over the position held by Mr. Cassanova, Mr. Cassanova candidly admits in his Complaint that he was acting at the request and advice of the Governor's Executive Counsel in determining his job duties. (Complaint, Appendix Document 3, ¶ 7.)

Mr. Cassanova was denied the right to obtain control of the records. (Complaint, Appendix Document 3, ¶ 8.) After release of the accounting functions was denied, Mr. Cassanova once again candidly admits reporting these actions directly to the Governor's Executive Counsel, (Complaint, Appendix Document 3, ¶ 10) for the purposes of seeking guidance as to further actions.

Upon the advice of the Governor's Executive Counsel, Mr. Cassanova once again renewed his request for access to the entire accounting documentation. (Complaint, Appendix Document 3, ¶ 13.) While the Judges voted to provide Mr. Cassanova with a copy of the budget, (see Complaint, Appendix Document 3, ¶ 13), to aid in his preparation of the plan of operation, Mr. Cassanova was still not satisfied with a majority ruling of the Judges, his supervisors, and conveyed the results of the meeting once again to the Governor's Executive Counsel. (Complaint, Appendix Document 3, ¶ 14.)

As Mr. Cassanova repeatedly points out in his Complaint, his job duties and activities while taken as an employee of the Board were determined not by his supervisors but rather by the Executive Counsel for Governor Edwards. (See e.g., Complaint, Appendix Document 3, ¶¶ 14, 17, and 20.)

In an attempt to circumvent the restraints placed upon his activities by statute and to override the Judges' wishes that the accounting functions remain within the control of the Criminal District Court (who has an acute interest in the adequate functioning of the jury venire), Mr. Cassanova drafted proposed legislation which, if enacted, would transfer control back to himself as Secretary of the Board. (Complaint, Appendix Document 3, ¶ 18[2]). Mr. Cassanova was made aware that his actions in drafting the legislation were directly contrary to the wishes of his supervisors yet Mr. Cassanova, acting in connection with the Governor's office, prepared the legislation anyway. (Complaint, Appendix Document 3, ¶¶ 18[2] and 19). It is clear that a majority of the Judges opposed this legislation.

(4) **Mr. Cassanova's Termination**

On June 24, 1993, an en banc meeting of the Criminal District Court was held and, pursuant to their supervisory authority over all employees on the Board, voted to terminate Mr. Cassanova from his position as an employee of the Board. (Complaint, Appendix Document 3, ¶ 27). As Mr. Cassanova readily concedes in his Complaint, the action of the Judges in terminating him from his employment was done in an "administrative capacity". (Complaint, Appendix Document 3, ¶ 29). The Judges who voted in favor of his termination are defendants herein.

Proceedings Below

This action was brought on February 1, 1994, by

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[2]It should be noted that the Complaint contains two Paragraph 18's. The first Paragraph 18 is referenced here.

respondents, Noel Patrick Cassanova and Karen Sullivan Cassanova (jointly "the Cassanova's" or "the plaintiffs" or the "respondent") pursuant to 42 U.S.C. §1983 and other federal and state law seeking damages allegedly arising from violation of Mr. Cassanova's constitutional rights by petitioners. Defendants/petitioners, Frank A. Marullo, Jr., James F. McKay, III, Dennis J. Waldron, Morris Reed, Gerard J. Hansen, Patrick Quinlan, Calvin Johnson and Frank Shea (collectively "the Judges" or "the petitioner" or "the defendants") are all judges of the Criminal District Court for the Parish of Orleans, State of Louisiana.

Initially, prior to answering the Complaint, the Judges, collectively, filed a motion to strike certain claims together with a Joint Motion to Dismiss all claims based on the doctrine of qualified immunity or, in the alternative, for failure to state claims as to certain specific allegations contained in the Cassanova's various "counts" of the Complaint. The District Court denied defendants' motion to strike in its entirety, and ruled individually on defendants' specific allegations denying some and granting others dismissing a portion of plaintiffs' claims thereby reducing to plaintiffs' federal claims to Section 1983 claims. None of these orders has been appealed.

In a separate "Order and Reasons", dated June 3, 1994, the District Court ruled on the Judges' 12(b)(6) assertion of qualified immunity, denying the motion to dismiss based thereon on two separate grounds. (Appendix Document 2). Judge Clement rejected the Judges' contention that an objective legal ground for terminating an at-will employee factors into the qualified immunity analysis, holding that the only issue relative to the qualified immunity defense in this case was the existence of a clearly established constitutional right. In addition, Judge Clement specifically found that the affirmative defense of qualified immunity,

governed by Rule 8(c) of the Federal Rules of Civil Procedure, did not "clearly appear" on the face of the plaintiffs' Complaint as it must in this pre-answer case.

The judges appealed the District Court's denial of their Motion To Dismiss on grounds of qualified immunity, and the United States Court of Appeals for the Fifth Circuit dismissed the appeal "because the defense of qualified immunity was not erroneously denied." (Appendix Document 1.)

Basis For Federal Jurisdiction In The Court Of First Instance

The District Court had proper original jurisdiction pursuant to 28 U.S.C. §§1331 and 1343 in this damage action for wrongful termination and deprivation of constitutional rights asserted pursuant to 42 U.S.C. §1983.

Appellate jurisdiction of the United States Court of Appeals for the Fifth Circuit was invoked pursuant to Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) and jurisdiction was conferred as the appeal was from an order rendered in the District Court denying appellants' defense of qualified immunity.

ARGUMENT

I. The Petitioners Are Entitled To Qualified Immunity.

A. A Public Officer's Subjective State Of Mind, I.E., Motive, Is Irrelevant To Whether The Public Office Is Entitled To Qualified Immunity.

This Court has defined the parameters of qualified immunity as follows:

> We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Harlow v. Fitzgerald, 457 U.S. 800, 817–818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). In so ruling, this High Court adopted a test for qualified immunity based upon a determination of the objective reasonableness of an official's conduct, not upon his subjective state of mind. Id. at 817–818, 102 S.Ct. at 2738. This Court chose the objective standard, of course, in order to shield public officers from undue interference with their duties and from potentially disabling threats of liability and to avoid the excessive disruption of government by permitting the resolution of insubstantial claims before the defendant was subjected to discovery. Id. at 806 and 818, 102 S.Ct. at 2732 and 2738. As this Court stated:

> In the context of *Butz* [v. Economou, 438 U.S.

> 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978)] attempted balancing of competing values, it now is clear that substantial costs attend the litigation of the subjective good faith of government officials. Not only are there the general costs of subjecting officials to the risks of trial -- distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service. There are special costs to "subjective" inquiries of this kind. Immunity generally is available only to officials performing discretionary functions. In contrast with the thought processes accompanying "ministerial" tasks, the judgments surrounding discretionary action almost inevitably are influenced by the decision-maker's experiences, values, and emotions. These variables explain in part why questions of subjective intent so rarely can be decided by summary judgment. Yet they also frame a background in which there is no clear end to the relevant evidence. Judicial inquiry into subjective motivation therefore may entail broad ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be particularly disruptive of effective government.

457 U.S. at 816-817, 102 S.Ct. at 2737. Thus, this Court recognized the importance of qualified immunity to the operation of government and the necessity of basing such qualified immunity on objective facts which may be readily determinable early in a litigation and not on the subjective

state of mind of the government official, which in most cases cannot ever be determined for certain.

This Court has further defined the nature of qualified immunity, as necessitated by the considerations described in the quote immediately above, as being an immunity from suit rather than a mere defense to liability. Hunter v. Bryant, 502 U.S. 224, 227, 112 S.Ct. 534, 536 (1991), citing, Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815, 86 L.Ed.2d 411 (1985). As such, questions of immunity should be decided by the court long before trial, not by a jury. Hunter, Id. at 228, 112 S.Ct. at 537. Thus, the question of qualified immunity should be decided by the Court, as a matter of law, if the undisputed facts in the case warrant it.

Since rendering the Harlow opinion, this Court has further explained the "objective legal reasonableness" rule to require a plaintiff resisting a plea of qualified immunity to show that the official's conduct was clearly unlawful in the light of pre-existing law. Anderson v. Creighton, 483 U.S. 632, 641, 107 S.Ct. 3034, 3040, 97 L.Ed.2d 523 (1987). Thus, in Anderson, the plaintiffs were required to demonstrate that the circumstances with which an FBI agent was confronted did not constitute probable cause for a warrantless search rather than to simply establish that the law is clear that warrantless searches not supported by probable cause violate the Fourth Amendment. Id. at 640-641, 107 S.Ct. at 3039. The Anderson Court summarized its holding thusly:

> The principles of qualified immunity that we reaffirm today require that Anderson [the FBI agent] be permitted to argue that he is entitled to summary judgment on the ground that, in light of the clearly established principles governing warrantless searches, he could, as a

> matter of law, reasonably have believed that the search of the Creightons' home was lawful.

Id. at 641, 107 S.Ct. at 3040. Thus, under the holding of the Anderson case, an official is entitled to qualified immunity if he could have reasonably believed that his conduct complained of was warranted by the law as applied to the facts of the case. Again, this is an objective test -- the official's actual motive is irrelevant to whether an official is entitled to qualified immunity.

B. When A Separate Valid Reason For Termination Exists, Then A First Amendment Right To Free Speech Prohibiting Discharge Is Not Clearly Established In The Governmental Employment Setting.

In the instant case, the respondents have alleged that the petitioners' termination of Mr. Cassanova's employment was not lawful and instead violated Mr. Cassanova's state and federal constitutional rights of freedom of speech, the right to peacefully assemble and to petition the government for redress of grievances, due process of law, privileges and immunities, and equal protection of the law. Counts 1-5, giving rise to their Section 1983 cause of action. The respondents summarized their claims in the District Court as follows:

> Mr. Cassanova was terminated essentially because (1) he engaged in his first amendment right to free speech in reporting financial misconduct to appropriate governmental authorities, and (2) he engaged in constitutionally protected activity in discussing with legislators and individuals in the

> Governor's office the need to statutorily revise the method by which the budgeted funds of the Jury Commission were handled. Both of these claims are asserted through 42 U.S.C. 1983. Plaintiff also asserts various state law claims under the pendant jurisdiction of this Court.

District Court Order and Reasons (Appendix Document 2), quoting, Plaintiffs Memorandum In Opposition To Defendants' Motion To Dismiss. And the Courts Below based their denial of the defendants' qualified immunity on the grounds that the defendants "[...] by terminating Mr. Cassanova's employment, may have violated his constitutional right to free speech [...]" and "[...] the right of an employee to blow the whistle on misconduct of public officials is a clearly established constitutional right and that defendants who violate that right are not, therefore, entitled to qualified immunity." Opinion of the Court of Appeal, Appendix Document 1 at A-2 and Order and Reasons of the District Court, Appendix Document 2 at A-8, respectively. Thus, the "clearly established right" so clear to the courts below was the right of freedom of speech.

The leading case on the constitutional right to freedom of speech and what constitutes a violation thereof in the employment setting is Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). In Mt. Healthy, a public school teacher had engaged in constitutionally protected speech that the teacher claimed was the reason for the School Board's decision to terminate his employment. Id. at 284, 97 S.Ct. at 574. Additionally, the teacher had engaged in unprotected speech and behavior which may or may not have been the true reason for the School Board's decision. Id. at 281-287, 97 S.Ct. at 573-576. This Court ruled that in order to

determine whether a violation of an individual's right to free speech had occurred in the employment setting, the following analysis must be made:

> Initially, in this case, the burden was properly placed upon respondent [the teacher/employee] to show that his conduct was constitutionally protected, and that his conduct was a "substantial factor" -- or to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him. Respondent having carried that burden, however, the district court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's re-employment even in the absence of the protected conduct.

429 U.S. at 187, 97 S.Ct. at 576. Therefore, Mt. Healthy is clear that if an employment would have been terminated anyway, then there is no violation of First Amendment guarantees of free speech, even if there was protected speech which was a motivating factor in the termination of the employment. It follows then that while the right to free speech is clearly established, that right does not translate to a guarantee of continued employment when the employee engages in unprotected speech or activities, which in themselves would have caused the employer to terminate the employee's employment.

To restate: The First Amendment right to freedom of speech is clearly established in the employment setting only insofar as it prohibits a termination of employment, solely because the employee has engaged in protected speech, *in the absence of a separate valid reason for termination.*

When a separate valid reason for termination exists, then a First Amendment right to free speech prohibiting discharge is not clearly established[3]. Indeed, under Mt. Healthy, it is clearly established that the First Amendment does not prohibit discharge under such a circumstance.

This Court has recently elucidated the scope of the First Amendment in the at-will[4] governmental employment setting. An at-will government employee generally has no claim based on the Constitution at all. Waters v. Churchill, __ U.S. __, 114 S.Ct. 1878, 1890 (1994). This is not to say that speech on matters of public concern is not protected -- it is. Id. at __, 114 S.Ct. at 1884. But, "the government as employer indeed has far broader powers than does the government as sovereign." Id. at __, 114 S.Ct. at 1886. As the Waters Court stated:

> But though a private person is perfectly free to

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[3]The belief that such a First Amendment right was clearly established was at the base of the Court of Appeals' ruling.

[4]Mr. Cassanova was an at-will employee in this case. Louisiana law is clear that when there is no contract of employment for a definite term, both the employer and employee are free to end the employment relationship at any time. La.C.C. art. 2747; Varnado v. Rodeway Express, 557 So.2d 413, 415 (La. App. 4 Cir. 1990). Mr. Cassanova has not alleged that his employment had a particular term. La.R.S. 15:111, which provides the position of Secretary of the Board of Jury Commissioners does not specify a term of employment.

> uninhibitedly and robustly criticize the state governor's legislative program, we have never suggested that the Constitution bars the governor from firing a high ranking deputy for doing the same thing. [Citations omitted.] Even something as close to the core of the First Amendment as participation in political campaigns may be prohibited to government employees.

Id. at __, 114 S.Ct. at 1886. Continuing in the same vein, this Court stated:

> [T]he reason the governor may, in the example given above, fire the deputy is not that this dismissal would somehow be narrowly tailored to a compelling government interest. It is that the governor and the governor's staff have a job to do, and the governor justifiably feels that a quieter subordinate would allow them to do this job more effectively.

Id. at __, 114 S.Ct. at 1888. Thus, this Court concluded:

> The key to First Amendment analysis of government employment decisions, then, is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.

Id. at __, 114 S.Ct. at 1888. All of these quotes are clear that in the governmental employment context, a governmental employer has broad latitude to limit what his employee says, if the employee's unlimited speech would tend to disrupt the operation of the governmental entity of which he is an employee.

This Court also indicated in Waters that the scope of the First Amendment in the governmental employment setting, or, stated another way, the breadth of the latitude of a governmental employer to limit what his employee says, must be determined on a case by case basis. As this Court stated:

> We have never set forth a general test to determine when a procedural safeguard is required by the First Amendment -- just as we have never set forth a general test to determine what constitutes a compelling state interest, [citations omitted], or what categories of speech are so lacking in value that they fall outside the protection of the First Amendment, [citations omitted], or many other matters -- and we do not purport to do so now. But though we agree with Justice SCALIA that the lack of such a test is inconvenient [...] this does not relieve us of our responsibility to decide the case that is before us today. [...]We must therefore reconcile ourselves to answering the questions on a case by case basis, at least until some workable general rule emerges. (Underlining added.)

Id. at __, 114 S.Ct. at 1885-1886. Petitioners submit that since there is no workable general rule and no general principle to determine where the line is drawn, the Waters

case is further authority that the First Amendment right to freedom of speech prohibiting discharge in the governmental employment setting is not clearly established. For the same reason, Waters is not dispositive of the issue of qualified immunity.

The Mt. Healthy and Waters Courts both indicated that the question of a defendant's motive is relevant to the merits of a First Amendment claim based on retaliatory discharge. The Waters Court stated:

> Though Davis and Waters would have been justified in firing Churchill for the statements outlined above, there remains the question of whether Churchill was actually fired because of those statements, or because of something else. *See Mt. Healthy, supra,* at 286–287, 97 S.Ct., at 575–576.
>
> Churchill has produced enough evidence to create a material issue of disputed fact about petitioners' actual motivation.

__ U.S. __ at ___, 114 S.Ct. at 1891. And the Mt. Healthy Court ruled that once the employee showed that his conduct was constitutionally protected and that his conduct was a motivating factor in the employer's decision not to rehire him, then the burden shifted to the employer to show "by a preponderance of the evidence that it would have reached the same decision as to respondent's re-employment even in the absence of the protected conduct." 429 U.S. at 187, 97 S.Ct. at 576 (see the quote from the Mt. Healthy Opinion supra at 14). Thus, a defendant's actual motivation may be relevant at trial to the issue of whether a constitutional violation occurred.

The Mt. Healthy and Waters decisions are not

inconsistent, however, with the Harlow and Anderson decisions, which eliminated subjective state of mind as a factor to be considered in determining entitlement to qualified immunity. This elimination of actual motivation as relevant to qualified immunity was part of the "balancing of competing values" inherent in qualified immunity. (See the discussion of qualified immunity at 9–12, supra.)

Petitioners respectfully submit that the actual motivation of the defendants in this case is irrelevant to the issue of whether they are entitled to qualified immunity. If the undisputed facts developed very early on, either in the Complaint or through discovery, could clearly support a reasonable belief that the termination of an employee was warranted because of unprotected activities by the employee, then the employer is entitled to qualified immunity as a matter of law[5]. Petitioners submit that as a matter of law, given the facts of this case as pleaded, their termination of Mr. Cassanova's employment was lawful and objectively

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[5]It should be remembered that, under Mt. Healthy, even if protected speech is a "motivating factor" in a dismissal, that fact is not dispositive. Furthermore, the "balancing of competing values" inherent in qualified immunity requires that the issue of qualified immunity be determined at the earliest time possible in this case. The City of New Orleans is currently in a crisis of crime. The people of New Orleans can ill-afford to have their criminal court judges distracted from their governmental duties and inhibited in the exercise of their discretion during a protracted litigation against them. See, quote from Harlow v. Fitzgerald at 10, supra.

warranted and did not violate a clearly established constitutional right of freedom of speech. Thus, Mr. Cassanova's allegations as to the actual motives of the petitioners in discharging him are simply irrelevant to whether the petitioners are entitled to qualified immunity.

C. Respondent Engaged In Conduct Fully Warranting The Termination Of His Employment.

Mr. Cassanova's Complaint is replete with admissions of behavior, both verbal and nonverbal, fully warranting termination of his employment. Mr. Cassanova's Complaint is clear that he assumed the position of Executive Director of the Board of Jury Commissioners with an agenda established neither by the Board nor by the Criminal District Court. As Paragraphs 7, 10, 13, 14, 16, 20, and 21 (Complaint, Appendix Document 3) indicate, Mr. Cassanova's understanding of the duties of his position, the person to whom he was to report confidential information acquired while working for the Board, and the person to whom Mr. Cassanova was ultimately responsible was the Executive Counsel of the Governor. Thus, in a very real sense, his activities at the Board were not on behalf of the Board. Further, Mr. Cassanova's Complaint is clear that he considered his position of "Executive Director" to in fact be "Secretary of the Board of Jury Commissioners" within the meaning of La. R.S. 15:111. (Complaint, Appendix Document 3, ¶ 4.) Such a position clearly carries with it a duty of confidentiality to the Board and to the Criminal District Court regarding decision making which is totally incompatible with Mr. Cassanova's loyalty to and reliance and dependence on the Executive Counsel of the Governor.

Mr. Cassanova's reliance upon the Executive

Counsel of the Governor for his own job description was totally improper. The Executive Counsel of the Governor was not the proper party to provide Mr. Cassanova's job description because under clear Louisiana law, the operation of the Board and its employees is determined by the Board and the Criminal District Court, with the latter having the ultimate authority. La. C.Cr.P. art. 404.1 provides in part:

> D. The Board in such parishes [of 475,000 or more in population] shall develop a plan to govern its operations. Such plan shall be approved by a majority of the judges of the Criminal District Court of such parishes.
>
> E. The Board shall have the authority over all its employees, subject to the supervision of the Criminal District Court. The Board by majority vote, shall determine all matters relating to is jurisdiction subject only to the approval of the Judges of the District Court or Criminal District Court.
>
> F. The accounting functions of the Board and of the Jury Commission shall be transferred to the Judicial Administrator of the Criminal District Court.
>
> G. All procedures and policies developed by the Jury Commission shall be under the direction and subject to the approval of the Criminal District Court, en banc.

These provisions all uniformly provide that the Board and the

Criminal District Court are responsible for decisions relating to the operation of the Board, with the Criminal District Court having the final vote on these operations. Thus, as a matter of law, the Executive Counsel of the Governor had no power whatsoever to decide what Mr. Cassanova's job duties were. And, Mr. Cassanova's dependence upon the Executive Counsel for instructions as to how to perform his job fully warranted his dismissal.

Mr. Cassanova's Complaint is also clear that he demanded access to the financial records of the Board including its payroll account, operating account, budget and inventory control sheets. Complaint, Appendix Document 3, ¶¶7, 8, and 10. Mr. Cassanova's alleged reason for attempting to obtain access to these records was that "his duties [as explained to him by the Executive Counsel of the Governor] required him to thoroughly analyze the financial records of the Board, particularly in regard to payroll and budget for the lurpose [sic] of determining whether public monies were being properly and prudently spent, whether those receiving checks from the Board were actually employed by the Board, and whether the level of funding was appropriate to meet the needs and responsibilities of the Board." (Complaint, Appendix Document 3, ¶ 7.) In fact, Louisiana law is clear that the Secretary of the Board is not the appropriate entity to conduct the activities Mr. Cassanova sought to conduct.

La.C.Cr.P. 404.1(F), quoted supra, is clear that the duty of monitoring the financial transactions of the Board rests in the Judicial Administrator of the Criminal District Court, not in the Secretary of the Board.[6] Therefore, Article

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[6]Mr. Cassanova's participation in the attempt to enact legislation which would have transferred accounting functions from

404.1 is clear that analyzing the records of the Board, including the Board's inventory control sheets, operating accounting, payroll account, and budget were not within Mr. Cassanova's domain as the Secretary of the Board.[7] By repeatedly attempting to exercise the accounting function for the Board, Mr. Cassanova overstepped his authority to an extent fully warranting his dismissal

In short, Mr. Cassanova's behavior during his employment at the Commission was ultra vires, disruptive, and destined him for firing. He was a bull in a china shop who had to be driven to the great outdoors.

Furthermore, Mr. Cassanova was in fact not a "whistle blower". His allegations do not support the proposition that his activities in some way constituted an exercise of his right to free speech in reporting questionable practices of public concern to appropriate state authorities. It is clear that Mr. Cassanova's communications with the Governor and his Executive Counsel were the result of their dominance of him in his performance of his job and not the result of Mr. Cassanova's desire to report irregularities to an "appropriate authority". Further, the Complaint contains no allegation that Mr. Cassanova had made any "reports"

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the Judicial Administrator to the Board is proof that Mr. Cassanova himself believed that the current law precluded him from following the Governor's Executive Counsel's instructions. (Complaint, Appendix Document 3, ¶ 18.)

[7]Mr. Cassanova's assertions that these activities were within his employment responsibilities (Complaint, Appendix Document 3, ¶¶ 7, 8, 10) are conclusions of law unsupported by the law.

whatsoever to either the employees of the Louisiana Civil Service Commission or to the Legislative Auditor prior to his being fired on June 24, 1993. Thus, Mr. Cassanova's claim at ¶38 that he was terminated because he had exercised his free speech in reporting to appropriate authorities is not supported by the allegations of his Petition. Indeed, "appropriate authorities" to whom Mr. Cassanova could have reported the alleged improprieties of the Board and/or Criminal District Court were the Judiciary Commission as provided in Article V, §25 of the Louisiana Constitution of 1974 and any law enforcement agencies having jurisdiction to investigate allegedly unlawful activities. It is clear then that Mr. Cassanova, by his own allegations, simply did not attempt to report alleged improprieties to an "appropriate authority" before his dismissal from employment. Therefore his statements to the Governor's Executive Counsel were entitled to little if any protection under the First Amendment. Surely a fair balance in the employment setting is to protect speech to appropriate investigative authorities and not to protect disruptive speech to others made for ulterior purposes. See, Waters, 114 S.Ct. at 1890–1891.

D. Petitioners Were The Appropriate Entity To Discharge Respondent.

The defendants were entirely reasonable in believing that they possessed the authority under Louisiana law to terminate Mr. Cassanova's employment. La. C.Cr.Proc. art. 404.1(E), quoted supra, provides that the authority of the Board over all of its employees is subject to the supervision of the Criminal District Court. Although not specifically defined in the statute, the concept of "supervision" is nothing new. Supervision is "the act, process, or occupation of supervising..." Webster's Third New International Dictionary, 2296 (1976). To "supervise" is to

"oversee with the powers of direction and decision in the implementation of one's own or another's intention..." Ibid. And finally, to complete the analysis, a "supervisor" is one that supervises a person, group, department, organization, or operation, as "(a): such a person having authority designated by an employer to hire, transfer, spend, recall, promote, assign, or discharge another employee or to recommend such action..." (Underlining added.) Id. at 2296. Thus, a reasonable interpretation of this language is that the Criminal District Court, in the exercise of its supervisory power over the Board's authority over its employees, may terminate the employment of an employee.

The legislative history of Senate Bill 704, which was enacted as 1985 Louisiana Act No. 558 and codified as Article 404.1, confirms this interpretation. The original bill approved by the Louisiana Senate contained in part the following provision:

> E. The Board shall have absolute authority over all of its employees, including any administrator or directors. The Board, by a majority vote, shall determine all matters related to its jurisdiction, subject only to the approval of the judges of the district court or the criminal district court.

The enrolled bill, and thus Article 404.1 states:

> E. The Board shall have authority over all of its employees, subject to supervision by the criminal district court. The Board, by a majority vote, shall determine all matters related to its jurisdiction, subject only to the approval of the judges of the district

court or criminal district court.

Thus, the House amended the bill, and the Senate approved that amendment, to delete the language that the Board would have "absolute authority", and to instead make the authority of the Board over its employees "subject to the supervision by the criminal district court." Hence, the defendants had every reason to believe that their termination of Mr. Cassanova's employment was in accordance with Louisiana law.[8]

Based on the foregoing, the defendants respectfully submit that as a matter of law and given the facts of this case as pleaded, their termination of Mr. Cassanova's employment was objectively warranted and lawful. Therefore, the defendants are entitled to qualified immunity as defined by this Honorable Court in Anderson v. Creighton.

II. The Defense Of qualified Immunity Asserted By The Judges Appears On The Face If Mr. Cassanova's Complaint By Virtue Of His Specific Allegations Establishing Official Administrative

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[8]The defendants respectfully disagree with La. Op. Atty. Gen. No. 93-404 to the effect that only the Board has the authority to fire its employees. In any event, Mr. Cassanova's employment was terminated on June 24, 1993, before Opinion No. 93-404 was rendered on July 8, 1993. Therefore, it played no role in the defendants' opinions of their power to fire Mr. Cassanova. ¶ 27, 30.

Capacity and Discretionary Authority.[9]

To be considered in a 12(b)(6) motion, the affirmative defense of qualified immunity, like any affirmative defense, need not be specifically pled in a responsive pleading. If an affirmative defense appears on the face of the pleading sought to be dismissed, a 12(b)(6) motion may be properly granted. Kansa Reinsurance Company v. Congressional Mortgage Corporation, 20 F.3d 1362, 1366 (5th Cir. 1994). Petitioners do not dispute the nature of the qualified immunity defense as an affirmative one, Harlow v. Fitzgerald, 457 U.S. 813, 815, 102 S.Ct. 2727, 2736 (1982), nor is it disputed that the availability of the defense must be specifically established by the pleadings. What petitioners contest is the District Court's[10] ruling on the "face of the pleading" exception.

To "state" the affirmative defense of qualified immunity, all that must be established is that the conduct in question occurred while the actor was acting (1) in his official capacity, and (2) within the scope of the discretionary authority. Cronen v. Texas Department of Human Services, 977 F.2d 934, 939 (5th Cir. 1992). Both of these requisites are established by Mr. Cassanova in his Complaint: there is no need for the Judges to plead these elements. Judge Clement's "finding" that the affirmative defense of qualified

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[9]The sufficiency of the pleading in this regard is a legal conclusion which this court reviews de novo.

[10]The Court of Appeal did not address this ruling of the District Court. Petitioners present the following argument in the event this Court addresses that ruling.

immunity "does not clearly appear on the face of the plaintiff's Complaint" is thus inconsistent with a plain reading of the Complaint as the following will illustrate.

A. Sitting State Judges Acting in an Administrative Capacity are Entitled to Assert Qualified Immunity and because the Cassanova's Specifically Alleged Capacity of the Judges, the First Requisite for Qualified Immunity is Met.

Qualified immunity protects government officials who engage in discretionary activity. Cronen, 977 F.2d at 939. There is no doubt that the Judges were acting in an official capacity as State judges at the time the termination of Mr. Cassanova occurred. In this regard the Complaint itself states as follows:

39.

> Cassanova was wrongfully "terminated" and payments to him "suspended" without lawful cause by State judges acting in administrative and not judicial capacities, who, under the color of State law, in the form of State action, intentionally disregarded State and federal law by conduct involving a reckless disregard or callous indifference to Cassanova's rights, and, in doing so, wrongfully damaged plaintiff.

Appendix Document 3. (Underlining added). As the above quoted language of the Complaint makes clear, the Judges were in fact sitting judges acting in their official capacities at the time of the termination occurred.

In addition to the allegations set forth at paragraph 39 of the Complaint, further allegations set forth at paragraph

29 of the Complaint establish the capacity of the Judges at the time the allegedly violative action occurred. (Appendix Document 3.) At paragraph 29 the Cassanova's specifically allege that the actions taken by the Judges "was done by defendants in their administrative capacity..." (Appendix Document 3). After Forrester v. White, 484 U.S. 219, 108 S.Ct. 538 (1988), it is clear that when a judge makes an employment related decision, such as was done with respect to Mr. Cassanova, he is acting in an administrative capacity similar to that of other public officials entitled to qualified immunity for their employment decisions. Forrester, 484 U.S. at 229, 108 S.Ct. at 545. It is thus clear that the actions taken by the Judges were "official" actions within the meaning of the doctrine and that the administrative capacity of the Judges and their entitlement to the defense insofar as this requisite is concerned clearly appears on the face of the plaintiff's Complaint.

B. The Judges Were Acting Within Their Discretionary Supervisory Authority In Terminating Mr. Cassanova As An At-Will Employee Of The Board.

The Judges as members of the Criminal District Court for the Parish of Orleans have supervisory authority over the employees of the Board. La.C.Cr.P. art. 404.1(E). Subsumed within the Court's supervisory power is the power to terminate at-will employees of the Board such as Mr. Cassanova. (See argument at 24-26 and n.4 supra[11].)

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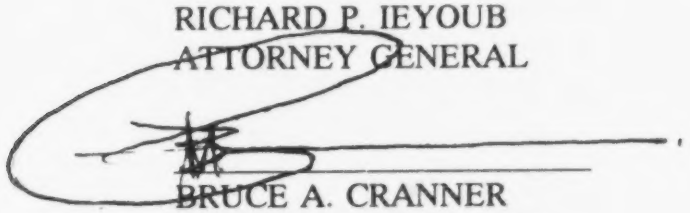
[11]28 U.S.C. § 1988 provides that where federal law is silent, a court looks to state law to supply the rule of decision. See also Wilson v. Garcia, 471 U.S. 261, 267 n.13, 105 S.Ct. 1942.

Since Mr. Cassanova specifically pleads his position with the Board (Appendix Document 3, ¶¶ 4 and 6), pleads that a majority of the Judges after an en banc meeting and vote decided to terminate him (Appendix Document 3, ¶ 27), and that the Judges did so in their capacity as "judges" (Appendix Document 3, ¶ 39), and given that the law is clear that the Judges have supervisory authority over all the Board's employees, the second requisite, discretionary authority is likewise established by the pleadings.

Because the Cassanova's specifically allege the capacity of the Judges at the time of the termination and because the law is clear that the Judges of the Criminal Court have authority to terminate at-will employees of the Board in their discretion, Mr. Cassanova's pleading of his status as an employee of the Board makes complete the facts sufficient to give rise to a consideration of the qualified immunity defense.

Respectfully submitted,

RICHARD P. IEYOUB
ATTORNEY GENERAL



BRUCE A. CRANNER
COUNSEL OF RECORD
C.T. WILLIAMS, JR.
J. ELLIOTT BAKER
Special Assistant Attorneys General
BLUE WILLIAMS, L.L.P.
3421 N. Causeway Blvd., 9th Fl.
Metairie, LA 70002
Telephone: (504) 831-4091

Counsel for the Petitioners